Supreme Court, U.S.
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No. 02-361

In The

Supreme Court of the United States

United States of America, et al.,
Appellants,

v.

American Library Association, Inc. et al.,
Appellees,

On Appeal from the United States District Court
for the Eastern District of Connecticut

BRIEF OF AMICUS CURIAE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Dean of the Anderson School of Business Management at the University of California at Los Angeles Clayton LaForce, George Mason University Law School Professor Walter Williams, and nationally syndicated columnist Joseph Perkins.

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about distortions of the correct constitutional analysis because of political correctness.

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[1] Eric Carleson authored this brief for the American Civil Rights Union (ACRU), with assistance from Peter Ferrara. No counsel for any party authored this brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. A motion for leave to file this brief accompanies it. Consent to the filing of this brief has been granted by the parties. Their letters of consent are enclosed with this brief.

SUMMARY OF ARGUMENT

CIPA provides that a library that is otherwise eligible for special federal assistance for Internet access in the form of discount rates for educational purposes under the Telecommunications Act of 1996, and in the form of federal grants under the Library Services and Technology Act, may not receive that assistance unless the library has in place a policy that includes the operation of a "technology protection measure" (i.e. the "blocking" of objectionable Internet websites via filtering software) on Internet-connected computers that protects against access by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors."

The district court below held that CIPA was unconstitutional on its face in that, by requiring a library to use a "technology protection measure," the federal government would be compelling librarians to make determinations as to what content can or cannot be viewed by library patrons, thereby violating the First Amendment rights of both library patrons and purveyors of non-objectionable content on the Internet whose information might be erroneously "blocked" by libraries. The district court found that libraries create a public forum, protected by the Amendment, when offering Internet services to their patrons; that strict scrutiny therefore applies to the judgments made by libraries as to what Internet materials will be made available to patrons; and that there are less restrictive alternatives available to libraries than filtering software so that patrons may view unobjectionable material while still being protected from objectionable material. Consequently, the district court found the Internet filtering requirements of CIPA to be unconstitutional.

The ACRU joins appellants in contending that CIPA is constitutional in its requirements, that a public forum is not created by the offering of Internet services to public library patrons, that strict scrutiny does not apply to the judgmental processes adapted by libraries in filtering content, and that less restrictive alternatives are not workable and available to libraries in meeting the requirements of CIPA. There is no First Amendment right to federally subsidized access to pornography. Nor, under the First Amendment, should libraries be forced to provide federally subsidized access to pornography.

ARGUMENT

I. The sole issue in the case is whether CIPA is facially invalid because it will induce public libraries, as state actors, to violate the First Amendment of The United States Constitution.

The Children's Internet Protection Act (CIPA) Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, provides that a library that is otherwise eligible for special federal assistance for Internet access in the form of discount rates for educational purposes under the Telecommunications Act of 1996, 47 USC 254(h) (Supp. V 1999), or grants under the Library Services and Technology Act, 20 USC 9121 et seq, may not receive that assistance unless the library has in place a policy that includes the operation of a "technology protection measure" on Internet-connected computers that protects against access by minors to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 47 USC 254(h)(6)(B) and (C) (Supp. V 1999); 20 U.S.C. 9134(f)(1).

The district court below ruled the CIPA unconstitutional on the grounds that it will induce public libraries, as state actors, to violate the First Amendment of the United States Constitution. In so ruling, the court below contends that public libraries using "technology protection measures" that "block" objectionable Internet websites via filtering software, would be making determinations as to what content can or cannot be viewed by library patrons, thereby violating the First Amendment rights of both library patrons and purveyors of non-objectionable content on the Internet whose information might be erroneously blocked by libraries.

The court specifically invalidated two provisions of CIPA. The first provides that a library may not receive E-rate discounts for Internet services unless the library has in place the technology protection software. The second provides that a library may not receive grants to establish Internet access under the Library Services and Technology Act unless the library has in place the technology protection software.

In making its ruling, the district court has nullified the intent of Congress that libraries, in establishing Internet access to the many educational and informative non-objectionable websites and information therein, be able to prevent minor and adult patrons from accessing illegal and harmful pornography on the Internet. This erroneous constitutional ruling, if left unchallenged, will impose a chilling effect upon the ability of public libraries to prevent patrons, including minor patrons, from accessing illegal and harmful pornography on the Internet. Given the ongoing growth and importance of the Internet as an educational and informational tool, it is imperative that reasonable

protections for patrons and libraries alike such as those afforded by CIPA be clearly established as constitutional.

II. CIPA's Filtering Provisions Are Facially Valid.

The CIPA provisions conditioning the receipt of federal funding to libraries upon the use by those libraries of technology protection measures are not unconstitutional, contrary to the ruling of the district court. Congress may not use its spending authority "to induce the States to engage in activities that would themselves be unconstitutional" (*South Dakota v. Dole,* 483 U.S. 203, 210 (1987)). This prohibition does not apply in the instant case, in which libraries which use their editorial judgment via filtering software to prevent access to illegal and harmful pornographic material may, as a permissible matter, access specified federal assistance.

As noted by the government and other parties, librarians who use filtering software as a means to prevent access to pornography are simply invoking their existing right – and professional duty – to keep objectionable material out of libraries patronized by adults and minors alike. As libraries under CIPA voluntarily elect whether or not to seek federal financial assistance for the development of Internet access, CIPA is not an abuse of the spending clause.

Moreover, there is no First Amendment requirement that the federal government help subsidize access to illegal and harmful pornography via the Internet on public library computers, no First Amendment right for federally subsidized access to pornography, and no First Amendment right to force libraries to provide federally subsidized access to pornography.

III. A Library's Use of Filtering Software is Constitutionally Permissible.

In making its ruling, the district court incorrectly and without precedent applied strict scrutiny upon public libraries in their ongoing efforts to determine the quality and nature of materials which are to be made available to patrons, both minor and adult, of those libraries. The court incorrectly held that a public library is a public forum and as such subject to forum analysis. Libraries do not allow patrons to make speeches in their libraries, or to conduct public meetings upon library premises without management approval; the presence of computers with Internet access does not convert the traditionally quiet and contemplative environment of a public library into a public forum. Public libraries are not a public forum subject to forum analysis.

Since long before the invention of the Internet and its introduction into the public library system, librarians have had the freedom and the obligation to determine which books and other materials are to be stocked on library shelves, and to regulate the activity of patrons within a library. Libraries do not make available to their patrons pornographic magazines, XXX pornographic video tapes, or DVDs of similar content. The introduction of computers and the Internet into the public library environment is of no difference to the charge of librarians to ensure that harmful pornographic materials are not readily available to minor or adult patrons.

The ACRU concurs with the government and other parties that available filtering software technology is an effective and constitutional manner of both complying with CIPA and of blocking access to pornography. Such software can and does identify a majority of existing

objectionable Internet sites and new sites as they become known. To the extent that such software might inadvertently block access to non-objectionable material on the Internet, a patron seeking access to such material would have a variety of timely means by which to access such material. The patron could ask a librarian to temporarily "un-block" access to the non-objectionable site. Or, the patron could access the non-objectionable site via an approach from another, unblocked, non-objectionable site.

Conversely, the ostensibly less restrictive alternatives to filtering software suggested by the district court are not workable and available to libraries in order to comply with CIPA. A library policy whereby warnings are posted against accessing pornography on the Internet, or seeking patrons to agree in writing not to do so, with librarians expected to police their patrons accordingly, imposes an undue burden upon librarians that is not balanced by First Amendment concerns. Attempts by librarians to enforce these prohibitions can lead to confrontations or altercations with patrons seeking to access pornography. Requiring librarians to scan "Internet logs" in an effort to determine if pornography has been accessed and the identity of patrons who have done so, would add inappropriate and burdensome job duties to the work of librarians. In addition, other patrons and the librarians themselves may be unduly upset by the viewing of any pornography accessed by a patron which might occur before that patron is stopped from continuing to do so.

Consequently, filtering software is preferable to the ostensibly less-restrictive alternatives sought under strict scrutiny and a public forum analysis, and is, given appellants contention that strict scrutiny does not apply, a constitutional and effective means of complying with CIPA under any circumstances.

CONCLUSION

The ruling of the district court below that CIPA is unconstitutional should be overturned.

Respectfully Submitted,

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